

It was undisputed the claimant suffered a compensable work-related injury to his low back. The sole issue for determination by the ALJ was the nature and extent of disability. Claimant alleged he was entitled to a work disability because respondent failed to

accommodate his permanent work restrictions. Respondent alleged claimant was terminated for reasons unrelated to his injury and but for that termination claimant would have continued to be accommodated at a comparable wage. Consequently, respondent argued claimant was only entitled to his functional impairment.

The ALJ determined that because claimant was terminated for excessive absenteeism his award should be limited to his functional impairment. Stated another way, the ALJ determined the claimant failed to demonstrate a good faith effort to retain accommodated employment paying a comparable wage. Consequently, the ALJ limited claimant's award to a 5 percent permanent partial functional impairment.

The claimant requested review and argues that his work with the concrete crew and then with the asphalt crew exceeded his permanent restrictions. Claimant argues that some of his absences from work were because of his back injury being aggravated after he returned to work. Moreover, claimant argues respondent failed to document the number of absences which led to his termination and that because respondent had never directed claimant to undergo drug testing he could not be said to have refused such testing. Consequently, claimant argues that respondent exhibited bad faith in terminating his employment and he is entitled to a work disability. In the alternative, claimant argues the Board should adopt Dr. Mills' opinion that claimant suffers a 10 percent permanent partial functional impairment.

The respondent argues it demonstrated good faith by providing claimant accommodated work within his restrictions. Respondent further argues it attempted to progressively discipline claimant regarding his absenteeism before ultimately terminating his employment after he was given a written warning that any further absences could result in discipline up to and including termination. And respondent argues it had an additional basis to terminate claimant because he failed to report for drug testing after reporting a work-related injury. Consequently, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board agrees with the ALJ's comprehensive and detailed fact findings as set forth in the Award. The Board adopts the ALJ's fact findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The record in this case establishes that claimant accepted accommodated work and continued to work until he was terminated. During the time claimant was working at a comparable wage equal to 90 percent of his pre-injury wage he was not entitled to a work disability.¹ However, once an accommodated job ends and claimant is no longer earning 90 percent of his pre-injury wages the prohibition against a work disability does not apply.²

The Kansas appellate courts, beginning with *Foulk*³, have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.⁴ Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.⁵

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,⁶ where the accommodated job violates the worker's medical restrictions,⁷ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.⁸

¹ K.S.A. 44-510e(a) (Furse 2000).

² *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁷ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁸ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. But it is claimant's burden to prove that he has made a good faith effort to retain appropriate employment. In this case, the ALJ made detailed findings regarding the claimant's problems with absenteeism, his receipt of verbal as well as written warnings regarding that issue and his subsequent absenteeism from work after receiving the written disciplinary warning. The Board agrees with and adopts the ALJ's determination that respondent exhibited good faith in its efforts to progressively discipline claimant and in its ultimate conclusion to terminate claimant's employment. The Board concludes that claimant has failed to prove that he made a good faith effort to retain his employment with respondent.

Claimant's loss of an accommodated job paying 90 percent or more of his pre-injury average gross weekly wage resulted from claimant's failure to comply with respondent's written warning regarding absenteeism from work. Had he done so, claimant most likely would have continued to be provided accommodated work within his restrictions and would be earning a comparable wage. Accordingly, claimant's conduct is tantamount to refusing to work and, therefore, the salary that he was receiving from respondent should be imputed for the post-injury wage in the wage loss prong of the permanent partial general disability formula. As this would have been at least 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to compensation calculated by using his percentage of functional impairment.

Claimant argues that the functional impairment rating should be based upon Dr. Mills' 10 percent rating. Both Drs. Estivo and Mills utilized the DRE Lumbosacral Spine Impairment table to determine the extent of claimant's functional impairment. Dr. Estivo concluded claimant's symptoms appropriately placed him in Category II for a 5 percent permanent partial functional impairment. Dr. Mills placed claimant in Category III for a 10 percent permanent partial functional impairment. Based upon the lack of claimant's complaints of ongoing radiculopathy into his leg as well as the absence of electrodiagnostic evidence of nerve root compromise, the ALJ concluded Dr. Estivo's rating more appropriately reflected claimant's impairment. The Board agrees and adopts the finding that claimant suffered a 5 percent permanent partial functional whole body impairment.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 31, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Melvin J. Sauer Jr., Attorney for Claimant
 Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
 Bruce E. Moore, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director